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No. 88-988

In the Supreme Court of the United States

OCTOBER TERM, 1988

TOWNLEY MANUFACTURING CO., INC., PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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15p

QUESTIONS PRESENTED

1. Whether petitioner, which is a for-profit corporation that makes mining equipment, is a "religious corporation" within the meaning of Section 702 of the Civil Rights Act of 1964.

2. Whether petitioner failed to comply with its Title VII duty to accommodate an employee's religious beliefs when it required that employee to attend religious services.

3. Whether petitioner's right to the free exercise of religion is violated by Title VII's requirement of reasonable accommodation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is reported at 859 F.2d 610. The opinion of the district court (Pet. App. 43a-49a) is reported at 675 F. Supp. 566.

JURISDICTION

The judgment of the court of appeals was entered on October 20, 1988. The petition for a writ of certiorari was filed on December 13, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Townley Manufacturing Co., a closely held corporation organized under the laws of Florida, manufactures mining equipment. Jake and Helen Townley, the principal shareholders of petitioner, founded the

company in 1963 when they opened the first plant in Florida. Petitioner has since opened other plants, including one in Eloy, Arizona. Pet. App. 2a.

The Townleys are Christians who promised God that their business "would be a Christian, faith-operated business" (Pet. App. 2a). But petitioner's articles of incorporation do not refer to a religious purpose (Pet. App. 18a), nor has petitioner ever sought or received tax-exempt status as a religious entity under Section 501(c)(3) of the Internal Revenue Code. Petitioner manifests its owners' Christian beliefs through various practices. It encloses Gospel tracts in its mail, prints Bible verses on its commercial documents, and makes financial contributions to churches, missionaries, Christian radio broadcasts, and a prison ministry. Petitioner also conducts mandatory weekly Christian devotional services during work hours for all its employees. Pet. App. 2a-3a. Petitioner's Florida plant has held weekly devotional services since the plant was built in 1973. Petitioner did not start the services at its Eloy plant, however, until April 1984, eleven years after opening that plant. Pet. App. 51a.

Louis Pelvas began working at the Eloy plant in November 1979 as a machinist. In December 1982, Pelvas was given a new employee handbook stating that all employees were required to attend weekly devotional services. Pelvas later signed a statement agreeing to abide by all requirements in the handbook as a condition of his employment. Pet. App. 3a.

Pelvas attended the religious services for two months, but then asked to be excused because he is an atheist. His supervisor told him that attendance was mandatory but that he could sleep, read, or listen to a radio during the services. In October 1984, Pelvas filed a charge of religious discrimination with the Equal Employment Opportunity Commission (EEOC). In December 1984, Pelvas

left the company. The company claimed he refused an offer to relocate to the Florida plant. Pelvas claimed he was constructively discharged. Pet. App. 3a-4a.

2. In July 1986, the EEOC filed this action against petitioner. The EEOC claimed that petitioner violated Section 703(a) of Title VII of the Civil Rights Act of 1964 by (1) requiring attendance at weekly devotional services, (2) failing to accommodate Pelvas's objection to attending the services, and (3) constructively discharging Pelvas. In May 1987, the district court granted the EEOC's motion for summary judgment on the first two issues and issued a permanent injunction prohibiting Townley from continuing the mandatory devotional services at the Eloy plant. The district court left the constructive-discharge issue for trial. Pet. App. 4a.[1]

3. The court of appeals substantially affirmed the trial court's decision. The court ruled that petitioner's practice of requiring employees to attend religious services over their objection violates Title VII's prohibition against religious discrimination in employment.[2] The court noted that Congress added Section 701(j) to Title VII in 1972 to create a duty on the part of employers to accommodate an employee's religious practices unless such an accommodation would cause undue hardship. The court of appeals ruled that petitioner failed to establish undue hardship here because it did not show that its business would suffer

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[1] After trial, the district court ruled that petitioner had not constructively discharged Pelvas. It also found petitioner in contempt of its earlier injunction prohibiting mandatory attendance at devotional services. This latter decision is currently on appeal to the Ninth Circuit. Pet. App. 4a.

[2] Petitioner has not contended that Pelvas's atheism is not a protected belief covered by Title VII's prohibition against religious discrimination.

if Pelvas were excused from attending the worship service. Pet. App. 5a-13a.

The court of appeals also rejected petitioner's claim that it is exempt from the requirements of Title VII because it is a "religious corporation" within the meaning of Section 702. The court examined the various religious and secular characteristics of the company and agreed with the district court that petitioner's primary purpose is secular. Pet. App. 17a-19a.

Finally, the court of appeals ruled that Title VII does not violate the First Amendment rights of the Townleys to practice their religion. Applying the analysis employed by this Court in *United States* v. *Lee,* 455 U.S. 252 (1982), the court considered: (1) the effect of Title VII on the exercise of the Townleys' religious belief; (2) the existence of a compelling governmental interest justifying such an effect, and (3) whether an exemption from the statute would impede objectives sought to be advanced by Title VII (Pet. App. 20a-23a).

The court determined that the statute's impact on Townley's religious practices is neither unreasonable nor extreme since the Townleys are still able to share their religious convictions with their employees; the Townleys simply may not force employees to attend devotional services over their objection (Pet. App. 21a). The court next ruled that the government has a clear and compelling interest in eliminating religious discrimination in the workplace (*ibid.*). The court then held that the goals of Title VII would be undermined if an exception were made in this case (*ibid.*).

The court of appeals, however, ruled that the district court's injunction prohibiting all mandatory services was overbroad since Title VII's goal is accomplished "by protecting only those who have *religious* objections to the

services" (Pet. App. 23a (emphasis added)). Accordingly, the court remanded the case to the district court to modify its injunction.

ARGUMENT

The decision of the court of appeals is correct and it does not conflict with the decision of any other court. Thus, no further review is warranted.

1. Petitioner renews its claim that it is exempt from Title VII's prohibition against religious discrimination because it is a "religious corporation" within the meaning of Section 702. Section 702 does not further define the term "religious corporation." The sparse legislative history of that provision, however, shows that Congress understood that the term "religious corporation" does not cover every organization with some tie to a religion. That is clear from Congress's perceived need to add an amendment to Title VII (§ 703(e)) to permit educational institutions to discriminate on the basis of religion if the institution is wholly or partly supported "by a particular religion or by a particular religious corporation, association, or society" (42 U.S.C. 2000e(2)). Accordingly, the most that can be said is that Congress probably thought that the term "religious corporation" would include "[c]hurches, and entities similar to churches" (Pet. App. 15a).

There has been very little litigation over the meaning of "religious corporation" in Section 702. Most litigation under Section 702 has involved concededly religious organizations. See, *e.g.*, *Corporation of the Presiding Bishop* v. *Amos*, No. 86-179 (June 24, 1987) (corporations were organized to perform activities on behalf of the Mormon Church and were tax-exempt, nonprofit religious entities under Section 501(c)(3) of the Internal Revenue Code); *EEOC* v. *Pacific Press Publishing Ass'n*, 676 F.2d

1272, 1274 (9th Cir. 1982) (nonprofit corporation affiliated with the Seventh Day Adventist Church organized to publish religious material); *EEOC* v. *Mississippi College*, 626 F.2d 477 (5th Cir. 1980) (college owned and operated by convention of Southern Baptist churches), cert. denied, 453 U.S. 912 (1981). Indeed, we are aware of only two cases addressing whether a Title VII defendant was an exempt religious organization under Section 702.

In *McClure* v. *Salvation Army*, 323 F. Supp. 1100 (N.D. Ga. 1971), aff'd, 460 F.2d 553 (5th Cir.), cert. denied, 409 U.S. 896 (1972), the court determined that the Salvation Army is a religious corporation. The court observed that the Salvation Army was incorporated under the laws of Georgia for the "purpose of promoting the cause of Christian religion, charity and education" (323 F. Supp. at 1104). The court concluded that the non-profit organization was truly a " 'church on wheels' " (*ibid.* (citation omitted)). By contrast, the court in *Fike* v. *United Methodist Children's Home*, 547 F. Supp. 286 (E.D. Va. 1982), aff'd, 709 F.2d 284 (4th Cir. 1983), held that the United Methodist Children's Home was not a religious corporation. The court examined the day-to-day activities of the home and concluded: "While the purpose of caring for and providing guidance for troubled youths is no doubt an admirable and a charitable one, it is not necessarily a religious one" (547 F. Supp. at 290). The court stated that "[f]or an organization to be considered 'religious' requires something more than a board of trustees who are members of a church" (*ibid.*).

Under the approach employed in *McClure* and *Fike*—one that looks to the objective characteristics of the organization—there is no doubt that petitioner is not a "religious corporation" within the meaning of Section 702. Petitioner produces an admittedly secular product—mining equipment. Petitioner is a money-making enter-

prise. Petitioner is not affiliated with or supported by any church, and petitioner's articles of incorporation express no religious purpose. Petitioner is clearly a typical commercial enterprise whose owners happen to be Christians. And contrary to petitioner's contention, there is no evidence that Congress intended to provide an exemption for commercial businesses that are owned by religious persons.

Petitioner argues that its owners—Mr. and Mrs. Townley—"are not able to separate God from their daily lives" (Pet. 12). In drafting Title VII, however, Congress did make such a distinction: between for-profit commercial enterprises and religious organizations. That distinction would be meaningless if a person could exempt his secular business from Title VII simply by stating that he always works for God. Thus, although there may be close cases, this is not one. Petitioner is not a "religious corporation," as that phrase is commonly understood. See generally *Corporation of the Presiding Bishop* v. *Amos,* No. 86-179 (June 24, 1987), slip. op. 5 (Brennan, J., concurring) ("The fact that an operation is not organized as a profit-making commercial enterprise makes colorable a claim that it is not purely secular in orientation.").

2. Petitioner next contends that, even if it is subject to Title VII, it had no duty to accommodate Pelvas's religious beliefs.[3] Petitioner first argues that Pelvas waived

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[3] Petitioner also argues that it had made sufficient efforts to accommodate Pelvas's religious objections by permitting him to sleep, read, or listen to a radio during the mandatory services (Pet. 14). In the court of appeals, however, petitioner "admit[ted] that it ha[d] made no effort to accommodate Pelvas' objections to the services" (Pet. App. 8a). In any event, Pelvas objected to attending the religious service, not merely to hearing the message from the pulpit.

his Title VII rights when he signed a standard form by which he agreed to abide by petitioner's rules, including the requirement of attendance at the religious service. That claim is foreclosed by this Court's ruling in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 51 (1974), that "there can be no prospective waiver of an employee's rights under Title VII." As the Court observed in *Alexander* (*ibid.*), the notion of an employee's waiver of Title VII rights is inconsistent with Congress's scheme. Accord *J.I. Case Co.* v. *NLRB*, 332 U.S. 337 (1944); *Spirides* v. *Reinhardt*, 613 F.2d 826, 832 (D.C. Cir. 1979) (employment contracts may not be used to waive protections granted to an individual under an Act of Congress).[4]

Petitioner also argues (Pet. 17-18) that it would be an "undue hardship" to accommodate Pelvas's beliefs by excusing him from devotional services. Petitioner asserts that the Townleys would violate "the Biblical command to allow God's Holy Spirit to operate in all aspects of their lives" if they were to excuse Pelvas from the religious service (*id.* at 17). That assertion, however, is not a defense under Title VII.

Section 701(j) provides that an employer need not accommodate an employee's religious beliefs if it would cause an "undue hardship on the conduct of the employer's business" (42 U.S.C. 2000e(j)). Thus, the plain language of Section 701(j) focuses on the business costs of accommodation, not on whether an accommodation interferes with an employer's religious preferences. See, *e.g.*, *Ansonia Board of Educ.* v. *Philbrock*, 479 U.S. 60, 69 (1986) (approving remand to determine cost of permitting

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[4] Petitioner's claim that Pelvas entered into a settlement agreement regarding a Title VII dispute is frivolous. Petitioner was not even conducting religious services at its Eloy plant when Pelvas signed the standard employee form.

leave time to be used for religious purposes); *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 84 (1977) (evaluating the financial cost of giving an additional Saturday off to certain employees); *EEOC* v. *Ithaca Industries, Inc.*, 849 F.2d 116 (4th Cir. 1988).

Here, there was no showing that petitioner's excusing Pelvas from devotional services would cause any hardship on the conduct of its business of making mining equipment. To be sure, petitioner may prefer that all of its employees engage in Christian practices. But Section 701(j), which is designed to permit religious pluralism in the workplace whenever reasonable, does not allow petitioner to force Pelvas to attend religious services that do nothing to contribute to the efficiency or profitability of petitioner's business.

3. Finally, petitioner asserts that Section 701(j), as applied in this case, violates the Free Exercise Clause of the First Amendment by forbidding the Townleys from requiring their employees to attend religious services. That claim is unpersuasive.

Initially, it is unclear that Section 701(j) "actually burdens the [Townleys'] freedom to exercise religious rights." *Tony and Susan Alamo Foundation* v. *Secretary of Labor*, 471 U.S. 290, 303 (1985). Petitioner is free to hold religious services for its employees. Petitioner is free to invite all of its employees to attend those services. Petitioner simply cannot compel the attendance of those employees who have religious objections to attending the services. But petitioner states that "[n]o employee has ever been disciplined or discharged for failing to attend company sponsored devotional services" (Pet. 23). And petitioner did not begin holding religious services at its Eloy plant until 11 years after that plant opened. Accordingly, it appears that the application of Title VII to petitioner

will have no (or at most a de minimis) effect on the Townleys' religious beliefs and practices.

In any event, any minor burden on the Townleys' religious practices is justified in this case. This Court has made it clear that "not all burdens on religion are unconstitutional." *United States* v. *Lee,* 455 U.S. 252, 257 (1982). Rather, the government may "justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest" (*id.* at 257-258). See also *Thomas* v. *Review Board of Indiana Employment Security Division,* 450 U.S. 707 (1981). Here, Congress added Section 701(j) to Title VII " 'to assure that freedom from religious discrimination in the employment of workers is for all time guaranteed by law.' " *Trans World Airlines, Inc.* v. *Hardison,* 432 U.S. at 75 (citation omitted). Congress determined that "religious freedom in a society with many different religions" (Pet. App. 23a) requires employers to accommodate different employees' religious practices if they can do so without any undue burden on their businesses. Thus, the important interest advanced by Section 701(j)—tolerance of different religious beliefs—clearly outweighs any de minimis burden on the Townleys' particular religious practices. See generally *United States* v. *Lee,* 455 U.S. at 259 ("To maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good.").

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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